Century Restaurant and Buffet, Inc., d/b/a Best Century Buffet, Inc. and Century Buffet Grill, LLC *and* 318 Restaurant Workers' Union. Case 22–CA–029242

March 26, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On May 2, 2011, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. Additionally, the Acting General Counsel filed cross-exceptions with supporting argument.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

AMENDED CONCLUSIONS OF LAW

Add the following as Conclusion of Law 9 to the judge's decision.

"9. By coercively interrogating employees about conduct protected by Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act."

AMENDED REMEDY

In addition to the remedies provided for in the judge's decision, we shall order the Respondent to make unit employees whole for any losses suffered as a result of its unilateral changes, including requiring employees to pay for their meals, eliminating the employees' transportation benefit,[3] reducing the work hours of employees, and requiring employees to sign in and sign out for work each day. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt, for the reasons stated in his decision, the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Li Xian Jiang (Jessica). We find it unnecessary to pass, however, on the judge's discussion of whether the Respondent made an unconditional offer of reinstatement to Jessica following her discharge, as this is a matter properly left for the compliance stage of this proceeding. See, e.g., *Home Insulation Service*, 255 NLRB 311, 314 fn. 12 (1981), enfd. 665 F.2d 352 (5th Cir. 1981).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act when it stopped providing employees with transportation to and from work, Member Hayes finds it unnecessary to pass on the judge's finding that this conduct also violated Sec. 8(a)(3), as any such finding does not materially affect the remedy.

We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by questioning employees about protected conduct during depositions related to the employees' Federal wage-and-hour lawsuit against the Respondent. Applying the Board's decision in *Guess?, Inc.*, 339 NLRB 432 (2003), we conclude, in agreement with the judge, that the Respondent's questions concerning the union membership of other employees were not relevant to the Federal court proceeding and, accordingly, were unlawful. With respect to questions concerning the union membership and activities of the deposed employees themselves, we conclude that even assuming arguendo that the questions were relevant to the wage-and-hour lawsuit, the Respondent's interest in obtaining the information did not outweigh the employees' confidentiality interests under Sec. 7 of the Act. Member Hayes joins his colleagues in adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by questioning employees about the union membership of other employees. Member Hayes finds it unnecessary to pass on the judge's finding that other deposition questions posed by the Respondent were similarly unlawful, as any such findings are cumulative and do not affect the remedy.

We deny the Respondent's motion to reopen the record to receive additional evidence. The evidence the Respondent seeks to adduce has not been shown to be newly discovered or previously unavailable, as required by Sec. 102.48(d)(1) of the Board's Rules and Regulations. Further, the Respondent's purpose in introducing this evidence is to call into question the judge's credibility findings. It is well established that the Board will not reopen a record so that a party may attack a judge's credibility resolutions. See *Alta Bates Summit Medical Center*, 357 NLRB 259, 260 (2011); *Precoat Metals*, 341 NLRB 1137, 1137 fn. 1 (2004).

[2] We shall amend the judge's remedy to provide that the employees shall be made whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes in terms and conditions of employment.

In addition, we shall modify the judge's recommended Order to include the standard remedial language for the violations found. We shall further modify the recommended Order to include a provision requiring the Respondent to post the notice in both English and Chinese. Although the judge referenced this requirement in the remedy section of his decision, he inadvertently omitted it from his recommended Order. We shall also substitute a new notice to conform to the Order as modified.

For the reasons stated in his dissent in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

[3] There is a discrepancy in the judge's decision concerning the date that the Respondent stopped providing its employees with the transportation benefit. At one point, the judge stated that Union Vice President Fong Chun Tsai (Tony) credibly testified that by July 22, 2009, the Respondent was no longer driving the employees to and from work. Later in his decision, however, the judge stated that the transportation change occurred in early August 2009. Because the resolution of this discrepancy would not affect our findings, we shall leave this matter to the compliance stage of this proceeding.

at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Century Restaurant and Buffet, Inc., d/b/a Best Century Buffet, Inc. and Century Buffet Grill, LLC, Clifton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully interrogating employees about conduct protected by Section 7 of the Act.

(b) Discharging employees because of their union and other protected concerted activities.

(c) Changing the terms and conditions of employment of its unit employees because of their union or other protected concerted activities.

(d) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union, 318 Restaurant Workers' Union, as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time wait staff employed by the Respondent at its Clifton, NJ restaurant, excluding professionals, and guards and supervisors as defined in the Act.

(b) Rescind the following changes in terms and conditions of employment of its unit employees that were unlawfully implemented on and after June 10, 2009: requiring employees to pay for their meals, eliminating the employees' transportation benefit, reducing the work hours of employees, and requiring employees to sign in and sign out for work each day.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful changes implemented on and after June 10, 2009, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Within 14 days from the date of this Order, offer Li Xian Jiang (Jessica) full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(e) Make Li Xian Jiang (Jessica) whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Li Xian Jiang (Jessica), and, within 3 days thereafter, notify Li Xian Jiang (Jessica) in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Clifton, New Jersey facility copies of the attached notice marked "Appendix" in both English and Chinese.[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2009.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully interrogate you about conduct protected by Section 7 of the Act.

WE WILL NOT discharge you because of your union and other protected concerted activities.

WE WILL NOT change the terms and conditions of your employment because of your union or other protected concerted activities.

WE WILL NOT change the terms and conditions of employment of our unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union, 318 Restaurant Workers' Union, as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time wait staff employed by us at our Clifton, New Jersey restaurant, excluding professionals, and guards and supervisors as defined in the Act.

WE WILL rescind the following changes in the terms and conditions of employment for our unit employees that were implemented on and after June 10, 2009: requiring unit employees to pay for their meals, eliminating their transportation benefit, reducing their work hours, and requiring them to sign in and sign out for work each day.

WE WILL make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful changes in terms and conditions of employment implemented on and after June 10, 2009.

WE WILL, within 14 days from the date of the Board's Order, offer Li Xian Jiang (Jessica) full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Li Xian Jiang (Jessica) whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Li Xian Jiang (Jessica), and WE WILL, within 3 days thereafter, notify Li Xian Jiang (Jessica) in writing that this has been done and that the discharge will not be used against her in any way.

> CENTURY RESTAURANT AND BUFFET, INC., D/B/A BEST CENTURY BUFFET, INC. AND CENTURY BUFFET GRILL, LLC

Bert Dice-Goldberg, Esq., for the General Counsel.
Benjamin B. Xue, Esq. (Law Offices of Benjamin B. Xue, P.C.), of New York, New York, for the Respondent.
Fong Chun Tsai, Vice President, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and a first amended charge filed by 318 Restaurant Workers' Union (Union), on December 11, 2009, and January 7, 2010, respectively, a complaint was issued on May 24, 2010, against Century Buffet and Restaurant, Inc.

The complaint was amended at the hearing to change the name of the Respondent to Century Restaurant and Buffet, Inc., d/b/a Best Century Buffet, Inc., and Century Buffet Grill, LLC. (Respondent or Employer).[1]

The complaint alleges, and the Respondent admits that the appropriate collective-bargaining unit consists of "all full-time and regular part-time wait staff employed by it at its Clifton, NJ restaurant, excluding professionals, and guards and supervisors as defined in the Act." The Respondent denies the complaint allegation that since June 10, 2009, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by the Respondent.

The complaint, as amended, alleges that the Respondent unlawfully discharged employee Li Xian Jiang (Jessica).The complaint further alleges that the Respondent, in violation of Section 8(a)(3) and (1) of the Act, unlawfully (a) implemented a new policy requiring unit employees to pay for their meals,

[1] GC Exh. 7.

(b) eliminated the employee transportation benefit for unit employees, (c) reduced the work hours of unit employees, and (d) implemented a new procedure requiring unit employees to sign in and sign out for work each day, all because they joined and assisted the Union and engaged in concerted activities. It is also alleged that the Respondent, in violation of its 8(a)(5) obligation to bargain with the Union, took these actions without having given prior notice to the Union or affording it an opportunity to bargain with it concerning such actions.

The complaint also alleges that on about July 12, 13, and 15, 2010, Benjamin B. Xue, the Respondent's attorney and its agent, interrogated employees about their union activities and the union activities of other employees. The complaint further alleges that Ko Fun Yeung (Peter), the owner of the Respondent, was a supervisor and agent of the Employer, and also that Kam Chue Lam a/k/a Steven Lam, head waiter, was a supervisor and agent of the Respondent.[2]

The Respondent's answer denied the material allegations of the complaint and asserted certain affirmative defenses. On August 3, 4, November 18, and December 9, 2010, a hearing was held before me in Newark, New Jersey.[3] On the entire record including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a New Jersey corporation having its place of business in Clifton, New Jersey, has been engaged in the operation of a restaurant. During the past 12 months, the Respondent has derived gross revenues from its operations in excess of $500,000, and has purchased and received at its facility goods and materials valued in excess of $5000 directly from suppliers located outside New Jersey. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Identity of the Respondent

Century Buffet and Restaurant, Inc. was owned by the wife of Yen Pang Yeung until she died in 2006. Her husband then assumed the business and changed its name to Best Century Buffet, Inc. Yen Pang Yeung was retired when he became the new owner, and did not work at the restaurant. Instead, as testified by Peter, Steven Lam operated the restaurant. Lam hired and fired employees, decided on the number of staff to be employed, the number of days they worked, and assigned them work and breaktimes. The Company was dissolved in December 2009.

Ko Fung Yeung (Peter), the son of Yen Pang Yeung and his wife, stated that he became involved in the business on August 2, 2009, when the Union "allowed" him to "manage" his employees, including signing company checks and paying their salaries. He stated that before that time, the workers were not earning hourly wages, and he had not received "authority" from the Union to manage his staff.

Peter became the sole owner of the business on January 1, 2010, and renamed it Century Buffet Grill, LLC. The new business retained most of the same furniture, equipment, dishes, and silver, for which Peter did not pay his father any compensation. The business has remained in the same location since at least 2006. A sign on the outside of the restaurant which has been in place since 2006 identifies it as the "Century Buffet."

The wait staff employees who were employed in 2009 and were on the Best Century Buffet, Inc. payroll were Rong Chen, Li Xian Jiang (Jessica), Ming Xia Jiang, Rong Li (Lilly), and Jin Ming Lin (Ivan). Of those, Peter identified Rong Chen, Jessica, and Ivan as being members of the Union.[5]

Also employed at that time were kitchen workers Xing Chen, Xiu Duan Chen, Kwok Leung Eng, Xuezhu Ke, Ying Yip Lee, Hua Juan Li, Guo Zhong Lin, Ying Yu Mei, Sow Che Ong, Xiu Fang Pan, Bin Yang, Hua An Yang, Shaohong Yuan, Xuo Peng Zhang, and Hui Fang Zheng.

B. The Union Activities of the Employees

Employees Rong Chen, Li Xiam Jiang (Jessica), and Jin Ming Lin (Ivan) visited the Union's office in late 2008 or early 2009.[6] They spoke to Union Vice President Fong Chun Tsai (Tony).[7] They had a number of grievances about their working conditions. They complained that the wait staff was assigned to do "side work" in which they wash and cut vegetables, prepare wontons, and perform other work ordinarily done by the kitchen staff.

They informed Tony that they were not paid a salary, the Respondent deducted money from their wages and from their tips, Manager Lam shared in the tip pool, and that they had to pay for transportation to and from the restaurant. Tony said that he would locate an attorney who could help them. After their meeting, Rong Chen, Ivan, and Jessica spoke with each other about ways to improve their working conditions.

C. The Federal Lawsuit

On April 9, 2009, Rong Chen, Jessica, Ivan, and Jing Fang Lui filed a Federal lawsuit against the Respondent, its owner Ko Fung Yeung (Peter) and Steven Lam pursuant to the Fair Labor Standards Act and the New Jersey Wage and Hour Law.

[2] GC Exh. 24.

[3] All quotations of the testimony of witnesses and the text of documents were taken verbatim from the hearing transcript and the documents themselves.

[4] The Respondent included with its brief a motion to correct transcript which General Counsel moved to strike. I denied the motion and directed him to respond to the Respondent's motion. He thereafter submitted a response agreeing with certain of the Respondent's corrections and disagreeing with others. I agree with the changes in the transcript proposed by the Respondent as corrected by the General Counsel. Both documents are received in evidence as R. Exhs. 5(a) and (b).

[5] Rong Chen began work for the Employer in September 2007 and joined the Union in late 2008.

[6] Rong Chen stated that she went to the Union alone at that time, and had always visited the Union's office on her own.

[7] For ease in reading, the nicknames Ivan, Jessica, Peter, and Tony will be used.

The suit alleges violations of minimum wage and overtime laws, "unlawful expropriation of tips," and breach of contract. On May 29, Rong Chen, Ivan, and Jessica handed Peter a copy of the lawsuit. On June 22, a second amended complaint was filed by the same employees against the same defendants for the same causes of action. The Respondent hired the law firm of Wong, Wong, and Associates to represent it.

D. The June 10 Meeting

On June 1, 2009, the Union filed a petition for an election with the Board seeking a unit of wait staff employees. Tony testified that in early June 2009 Wong Chun Chen (Steven Wong), a community activist in Chinatown, called him and said that he represented the Employer, and wanted to meet with him. Wong asked him what the Union was demanding. Tony replied that the Employer should voluntarily recognize the Union. Wong replied that the Employer would recognize the Union but wanted it to withdraw the election petition. Tony stated that he and Wong had a "mutual understanding" that the Union would be recognized and would withdraw its election petition.

Peter testified that he asked Steven Wong to help him resolve the federal lawsuit and the NLRB election case, and asked Wong to arrange a meeting with the Union for that purpose. He told Wong that a law firm represented him, but nevertheless asked Steven Wong to set up the meeting.

A meeting took place on June 10 at Wong's office. Present for the Union were Tony, another union representative, and Ivan, and Rong Chen. The Respondent was represented by its owner, Peter, his ex-wife, and his ex-father in law. Peter stated that he believed that Wong and Tony both represented the Union.

Tony stated that prior to the meeting he asked that Peter's father, the owner of the restaurant, appear on June 10. At the meeting, Peter advised that he was given a power of attorney from his father that day either transferring the business to his name or authorizing him to operate the business, and in fact he began handling the Employer's affairs at that time.

The durable general power of attorney, dated June 10, 2009, from Peter's father to Peter, states essentially as follows:

> Yen Pang Yeung appoints Ko Fung Yeung at 166 Main Avenue, Clifton, NJ, my attorney-in-fact to act in my name, place and stead to conduct all types of transactions including real estate transactions, business operations, all other matters in connection with the restaurant business located at 166 Main Avenue, Clifton, NJ including but not limited to managing and operating said restaurant and any litigation matter in connection therewith.

Peter testified that the power of attorney gave him the authority to manage the wait staff and to "talk to the Union not to sue us." Tony quoted Peter as saying that he had the "full authority to operate this business and he has the power to negotiate with us and represent the restaurant."

Tony stated that at the meeting, Wong explained to Peter "what the Union's about and what signing of this meaning you know, that we're the bargaining unit that is able to bargain with the employers about the worker's condition." Tony asked Peter if he was willing to voluntarily recognize the Union and Peter said he was. Tony testified that he heard Wong ask Peter "do you understand if you do sign this and he signed. He said he understand." Tony said he saw Peter look at the recognition agreement, which was written in English, and sign it. Peter did not ask for a Chinese translation before he signed it. Tony said that he told Peter that he included his title, "vice-president of the Union" next to his signature and asked Peter to do the same. Peter wrote "CEO" next to his signature. Peter, Wong, and Tony signed the "Voluntary Recognition" letter which states as follows:

> Best Century Buffet Inc. (formerly d/b/a Century Buffet & Restaurant) hereby recognizes 318 Restaurant Workers Union as the exclusive representative for the purposes of collective bargaining for the employees in the following appropriate unit:
>
> All the full time and regular part-time wait-staffs employed by the Best Central Buffet Inc. which locates at 166 Main Avenue, Clifton, New Jersey. And excluding guards, professionals, and supervisors as defined in the National Labor Relations Act, as amended.
>
> Both parties agree the appropriate unit has 5 wait-staffs. The undersigned employer and the Third Party checked the union authorization cards which showed that union has 3 out 5 wait-staffs currently work in the restaurant signed the union authorization cards.

Tony denied making any threats or promises to Peter or Wong before the letter was signed, specifically denying that he promised that the Federal wage and hour lawsuit would be withdrawn if Peter executed the agreement. In fact, Tony stated that the Federal lawsuit was not even discussed prior to the execution of the recognition agreement. Rather, Tony stated that he promised to withdraw the petition for an election if Peter signed the document, and indeed, the Union withdrew the petition the following day. Employees Rong Chen and Ivan essentially corroborated Tony's testimony.

Tony testified that following the execution of the recognition agreement, those assembled spoke about the workers' conditions of employment. The employees complained that they should not have to perform side work for which they were not paid, and Tony asked Peter to stop assigning the waiters to such work.[8] Tony first stated that Peter said that he would consider the request, but then testified that Peter agreed that he would no longer require the waiters to do such work. Rong Chen and Ivan testified that in late July, the wait staff was no longer required to do side work.[9] Peter testified that he agreed to stop assigning side work "as long as you can cancel this case, the Federal and here," and the side work was stopped.

The employees also protested Manager Steven Lam's taking a share of tips. Tony told Peter that Lam is a manager and should not receive a share of the workers' tips. Peter agreed to

[8] Tony and Ivan testified that it was a common practice in the industry for waiters to perform side work.

[9] Peter said that, as of January 1, 2010, he no longer required the wait staff to do side work.

speak with Lam about the matter and promised to call the Union with an answer.

Another grievance presented in behalf of the workers was that when they were hired they were promised free transportation to and from Chinatown to the restaurant, but when the employees began work they were charged $5 per day for the trip by Steven Lam who drove them to and from work. Tony asked Peter to stop charging the workers for transportation, or to reimburse them the amount that they had to pay. Peter replied that he would think about it.

Peter testified that his reply to the demand for reimbursement was that if Tony canceled "this case" he would pay the workers $6 per day for transportation. As a counteroffer, the Union demanded $10 per day. No agreement was reached on reimbursing employees for their transportation costs.

Tony also told Peter that the workers complained that they received no wages from the Employer. Rather, they were paid from the customers' tips. He also told Peter that the Union protested the fact that the Employer charged the employees 16 percent from the tips included in credit card sales each day. The Employer also deducted from their pooled tips a total of $54 on weekdays and $90 on weekends. Peter said that he would speak to his accountant about that matter.

Tony told Peter that he must pay the workers their correct hourly wages. He conceded that in order to properly compute the sums owed the Employer must have a record of the total number of hours that each employee worked each day. Tony further agreed that such a record may be made by having the workers sign in and out each day or the Employer itself can keep such a record, noting when the employee enters and leaves the premises.

Peter testified that Tony and Wong spoke to him about how "this case" could be canceled. He stated that they told him to follow their advice; that he had to listen to them. He quoted them as saying that they could resolve "this case here" and, if that was done, Peter would not need an attorney and can save much money. They spoke to him about settling the Federal court case and mentioned different amounts of money it would take to resolve that case. Peter replied that he could not afford the sum of money demanded. In his Federal court deposition, when asked his role at the meeting, he stated that "we were negotiating regarding the lawsuits suing the Employer."

Peter clearly testified that he signed the recognition agreement so the NLRB election petition would be withdrawn, quoting Tony as saying that if he "signed this document this case would be cancelled—meaning the Labor Board case." In fact, the Union withdrew the petition immediately after the meeting.

Peter testified that when he was asked to sign the "voluntary recognition" agreement he was not told what it meant, he did not read it, and that the document was not translated into Chinese. His testimony that he did not understand English is belied by his further testimony that he wrote notes during this hearing in English but claimed that he did not know what he wrote, and that he read the English depositions of his father and Steven Lam. Although Peter testified that he was not "allowed" to take the document to his attorney before he reviewed it, he did not state that he asked to do so. Further, he stated that he did not need to ask for permission to have his attorney review it because those at the meeting said that the matter could be taken care of right then, and he did not have to pay his attorney.

Tony stated that by the time of the meeting the Federal lawsuit had been filed, but he could not recall if the Respondent was represented by counsel at that time, and he did not ask. Tony knew that Steven Wong was not an attorney. Tony did not recall if, on June 10, Peter told him that he had an attorney, or that he would not sign the recognition agreement until his attorney reviewed it. Tony has seen Peter write and speak English and stated that Peter understands spoken English. Tony testified that he was aware that Wong was not authorized by Peter to enter into any agreement with him on June 10.

Peter stated that when he wrote "CEO" next to his name, he did not know what that term meant, but wrote it because Tony asked him to do so, saying that "this is a position. It doesn't matter." He stated at the hearing that despite his having the power of attorney from his father, that fact did not make him the "CEO" of the company, and he denied ever being the CEO of Best Century Buffet. However, he also testified that he wrote "CEO" next to his name so that the NLRB case would be canceled. He incredibly testified that, even as of the date of the hearing, he did not know what the voluntary recognition agreement meant. Indeed, Peter testified that he never voluntarily recognized the Union for the restaurant, and had he known that by signing it he was recognizing the Union he would not have signed it that day.

Peter further said that if he did not sign the agreement he believed that his employees would demonstrate in front of the restaurant. He was afraid of that possibility because such an action would affect his business, and the restaurant may have had to close.

As to the substance of the meeting, Peter testified that Tony complained that the workers' hours were too long. Peter replied that they wanted to work long hours. Peter promised to try to reduce the work hours, and in fact, after August 1, when the Union "permitted" him to manage their hours, he changed their work schedule, reducing their hours pursuant to Tony's request.

E. The July 22 Meeting

Peter testified that he requested that Wong arrange another meeting with Tony because he fulfilled "many" of the Union's requests since the last meeting, but the Federal court case had not yet been canceled.

At a meeting on July 22 at which the same persons were present, they discussed the employees' monetary demands in the Federal court case. When Tony said that the employees sought about $800,000, Peter expressed surprise and said that the amount should be reduced. Tony said that the employees would consider lowering that sum if the Employer improved their working conditions first as a demonstration of "sincerity."

Tony asked Peter why Lam was still taking a share of employees' tips, and demanded that he order Lam to cease doing so. Peter replied that Lam was a waiter and not a manager, and as such he was entitled to share in the tips, offering to speak to Lam and advise the Union.

Tony also told Peter that since the employees were no longer being driven to work by Lam, they were taking public transportation at a cost of $10 to $11 per day. Tony asked that Peter

reimburse the workers for their transportation costs, and Peter agreed to reimburse them up to $6 per day. The employees did not agree to that amount.

Peter testified that he agreed with Tony's suggestion that he pay the workers $2.13 per hour as the regular rate, and $3.20 per hour for overtime. He also told Tony that in August he would begin managing the waiters' hours and pay them the correct wages due them.

F. Further Events in July

Tony spoke to the workers a few days after the July 22 meeting, and learned that Lam was still taking a share of tips from the workers and that Peter did not reimburse the employees for their transportation expenses. Tony called Steven Wong and asked him to check with Peter as to these issues. Tony stated that shortly thereafter Wong called him and said that he could not contact Peter, and that he no longer represented the Employer.

G. The Events in August

1. Meals provided by the Employer

Rong Chen, Ivan, and Jessica testified that prior to the filing of the Federal lawsuit in April 2009, the Employer provided the workers with three free meals per day from its buffet. However, in August 2009, Peter told them that the wait staff had to pay for the meals, at the price a customer pays, $33 or $35 per day during weekdays, and $45 per day on weekends. The amounts were deducted from their base pay. Ivan testified that he believed that the kitchen workers, cashier, a part-time waiter, and the hosts were not charged for their meals.

Rather than pay for their meals, in September 2009, the workers ceased eating employer provided meals and began bringing their own food. Nevertheless, according to Rong Chen and Ivan, the Employer continued to deduct the cost of the food from their pay, from the time they began bringing their own food until January 2010.

Peter testified that prior to August 2009 he had no "right" or "authority" to manage the wait staff or determine their days of work. Nevertheless, he worked at the restaurant and was aware that employees ate the buffet food as their meals and were not charged for their consumption of the buffet food. Beginning in August, when the Union permitted him to manage the wait staff, he notified the workers that they would have to pay for their meals. The workers replied that that was "no problem" and would agree to whatever way he wanted to run the restaurant. He also told them at that time that they had the right to bring their own food or buy it from another restaurant.

Peter deducted from their net wages the money they owed for consuming the buffet food. He stated that when the workers stopped eating the buffet food he no longer charged them for meals and, in January 2010, he stopped deducting money for the buffet meals the wait staff ate. According to Peter, he charged all the wait staff, including Steven Lam, whether they were members of the Union or not, the same amount for meals. He conceded that he did not advise the Union that he was going to charge the employees for eating the buffet food.

2. Transportation

Rong Chen stated that when she was hired in September 2007 she was interviewed by a human resources agency in Chinatown where she spoke with Steven Lam who hired her. She asked for a job with transportation to work. Ivan testified that when he was hired in February 2006, Lam told him that free transportation was provided with the job, but on his first day of work he had to pay Lam $5 per day for round trip transportation to work.

The workers paid Lam that sum from the start of their employment. Jessica stated that for 2-1/2 years she did not complain to anyone about that payment until she brought the Federal lawsuit, and did not ask the Employer for reimbursement for the money she paid. She acknowledged that Lam told her that he owned the car he used, and that it was not owned by the Employer.

Rong Chen testified that she asked Lam to ask Peter to reimburse the workers for their transportation costs. Lam replied that if she discussed this issue she would be fired.

As noted above, the Federal lawsuit included a claim for breach of contract. It is alleged that the plaintiffs and the Employer and Lam orally agreed to provide free transportation to the workers to and from their homes each day, and that the defendants breached that employment contract by failing to provide free transportation.

Rong Chen, Ivan, and Jessica testified that on August 7, 2009, Lam told them that they should lie in Federal court by testifying that they paid him the transportation fee voluntarily, and if they did not testify in that manner he would not take them to and from work. They refused and thereafter were not driven to and from work by Lam.[10]

Jessica stated that following that conversation, she and the other two workers told Peter that Lam decided not to drive them to and from work. She asked Peter to make "other arrangements" for them. Peter replied, "you are suing me. We will talk in the court." The workers then took public transportation to work at a cost of about $16 per day. Thereafter, Rong Chen, Ivan, and Jessica were no longer driven to work by Lam. However, he continued to drive waitress Lilly.

Peter testified that employees were not provided transportation benefits by the Employer, transportation expenses were not reimbursed by the Employer, and it had not agreed to reimburse such costs. Further, the Employer did not pay Lam to drive the employees to and from work. Peter stated that Lam charged employees for transportation regardless of their union affiliation, and no employee complained to him that Lam was charging them for that service.

Peter further testified that Lam's car was his own personal vehicle. He did not use a company car, and the Employer did not pay for his expenses such as gas, tolls, or repairs. Peter stated that in mid-August Lam stopped providing transportation to the workers for some unknown reason. Peter did not ask him to stop that service.

[10] This date is apparently in error. Tony credibly testified that at the July 22 meeting the workers were no longer being driven to and from work by Lam.

3. Reduction in the work hours of unit employees and the requirement that employees sign in and out of work

Jessica testified that before the Federal lawsuit was filed in April she worked 5 to 6 days per week, from 12 to 13 hours per day, from 10 a.m. to 10:30 p.m. However, in August 2009, her hours were changed by Peter so that she only worked 5 days per week, from 11 a.m. to 9:30 p.m., about 9-1/2 hours per day. Rong Chen and Ivan testified to essentially the same changes in their workdays and schedule. Jessica noted that there was no change in the days of the week or the hours that the restaurant was open for business. She further noted that the hours of wait staff employee Rong Li (Lilly), who was not a union member, and part-time worker David, who is Peter's cousin, were not reduced. Ivan testified that the hours of the kitchen staff were not reduced. In addition, after Jessica was discharged in September, two replacements, Amy and Nicole, were hired.

Rong Chen and Ivan testified that when they began their employment in 2006 and 2007, respectively, they did not have to sign in and out of work when they arrived and when they left for the evening. However, in August 2009, the wait staff was required to sign in and out. Rong Chen and Ivan stated that the part-time waiters and Steven Lam did not have to do so.

Peter stated that prior to August 2009 the wait staff worked 5 and, occasionally, 6 days per week. Beginning in August 2009, they worked 5 days per week. Peter claimed that he reduced the employees' work hours due to a complaint by Union Agent Tony that the employees' work hours were too long.

Peter denied changing the workers' hours because of their union activities, and stated that he adjusted all the workers' hours, not only those who were union members because business was poor. However, the restaurant was open for the same hours and days each week. Further, each of the wait staff worked 8 hours overtime after August 2009 because, according to Peter, the wait staff and the Union requested that they work additional hours.

Prior to August 2009, the wait staff was not required to sign in and out of work. Peter testified that in order to calculate the amount of overtime wages to be paid, he had to maintain time records for the wait staff.[11] In August 2009, he began keeping records of their work time by instituting a policy of having waiters sign in and out of work. He denied instituting this policy in order to retaliate against employees for their union activities. Rather, he claimed that Union Agent Tony asked him to keep these time records beginning in August 2009. Accordingly, he asked the wait staff to record the times they arrived at work and left for the day. He denied asking only the wait staff to record their hours, stating that he asked every employee to sign in and out.

Peter further stated that until December 31, 2009, the kitchen workers were not required to sign in and out of work because they had a regular schedule. However, at the time of the hearing, they also signed in and out of work.

[11] The Fair Labor Standard Act and the New Jersey Wage and Hour Law require that the Employer maintain such records.

H. The Alleged Discharge of Li Xian Jiang (Jessica)

Jessica began work for the Respondent in May 2006. She left work for 1 year to care for her newborn baby, and then resumed work in May 2008. As set forth above, she spoke with her coworkers in the union office about their working conditions, and she joined the Union in early 2009.

Jessica and Ivan stated that in July 2009 they received separate phone calls from Steven Lam who told them that Peter told him that they were members of the Union, and that they should not come to work the following day. They did not work the next day and were not paid for the day, but they returned to work thereafter.

Peter denied telling Lam to tell Jessica or Ivan not to come to work the next day because they were union members, stating that Lam was not a manager in August 2009, and did not have any management authority over employees' work schedules. However, Peter also testified that after he obtained the power of attorney in June 2009, Lam hired the waiters, but after August 2009, when the Union permitted him to manage the workers, Lam had no management authority over the wait staff. Lam did not testify.[12]

Jessica testified that on September 1, 2009, she had a miscarriage. She phoned Peter on September 3 and recorded the call.[13] In material part, the conversation is as follows:

JESSICA: Hi boss, this is Jessica.
PETER: What's the matter?
JESSICA: I have to take off for two weeks leave.
PETER: I see. You want to take off for two weeks leave. Is that right?
JESSICA: Yes. I want to take off for two weeks leave, because … this morning, I fell down . . . I was pregnant.
PETER: What happened to you?
JESSICA: Today, when I went out, I fell down, and I had a miscarriage.
PETER: You were pregnant and you had a miscarriage, is that so?
JESSICA: Yes.
PETER: I see. Sorry, sorry.
JESSICA: I am still in the hospital, I have not returned home yet. I have to tell you that I want to take a leave.
PETER: I see.
JESSICA: Take a leave.
PETER: No problem, no problem.
JESSICA: For next two weeks, I want to take off for two weeks leave. Is that right?
PETER: Well, I will try my best, I will try my best.
JESSICA: Okay.
PETER: I will try my best.

[12] Respondent's attorney stated that he asked Lam, who was currently employed by the Respondent, to appear at the hearing but that Lam had to take care of certain personal matters.

[13] Respondent's attorney agreed to accept the English translation made by the interpreter as an accurate translation of this conversation and the recorded phone call of September 17. Peter testified that he listened to the recordings of the calls and it refreshed his recollection of the conversations.

PETER: Whenever you are able to work, you can call me and I will make an arrangement for you. Is that right?

JESSICA: Okay. I just want to tell you, I just want to tell you that I want to take off for two weeks leave, when I am about to work, I will call you and tell you.

PETER: That's right. This is the way to do it. Okay.

JESSICA: Is that right?

PETER: Yes, yes. That's it. Okay?

JESSICA: That's right. Thank you, boss.

Peter testified that Jessica told him in that phone call that she needed a "period of time to take a rest," and he was concerned that she would be out of work for a long period of time. Within the next 2 weeks, Peter hired Amy as a replacement for Jessica. A few days after hiring Amy, he hired Nicole, his cousin, who occasionally worked at the restaurant as a summer helper.

Two weeks later, on September 17, Jessica phoned Peter and again recorded the call. Jessica asked when she could return to work and Peter replied that "when you failed to report to work" he hired another worker to replace her, and no other jobs were available. He suggested that she obtain another job and "in the future, when I need to hire someone, you will be the first one for this job." Jessica protested that she asked for and was given a 2-week leave of absence, and that she should be returned to work immediately. Peter denied discharging her, and denied that he promised that she could resume working after her leave. Peter suggested that she speak to the Union to try to resolve the matter.

On September 22, the Legal Services of New Jersey sent a letter to Respondent's attorney, Xue, advising that, in accordance with Jessica's last phone call to Peter, she "is available for work and wishes to return to work as soon as possible." Xue replied on September 28, stating that Jessica "was in fact offered to return to work. . . . The Union . . . refused our clients' good faith offer and demanded unnecessary overtime that the business does not call for."

Jessica acknowledged in her Federal court deposition that Tony asked her whether she was willing to return to work 5 days per week. She refused to do so because she worked 6 days per week prior to August 2009, and wanted to resume work at her regular hours. Tony noted, however, that he did not tell Jessica that the Employer was willing to have her return to work. He was simply trying to have her reinstated.

Tony testified that Peter called him, asking to discuss "union issues." He told Peter that first he had to reinstate Jessica, who prior to that time told him that she wanted to return to work for more than 40 hours per week. Peter replied that if she had to return she must accept a 40 hour workweek—"what about if I give her 40 hours per week?" Tony said that such reduced hours would be retaliation against her because other workers were employed for 48 hours, and he asked why she could not be given the same hours she worked before she was fired. Tony asked him to fire the replacement worker but Peter said that he does not fire new employees.

Tony then told Jessica that Peter said that he had no position for her at that time. She denied being told that Peter wanted her to return to work for only 40 hours per week.

Peter testified that he told Tony that he was willing to have Jessica return to work but that he had too many waiters due to their receiving overtime. He suggested to Tony that if all the wait staff worked 40 hours per week instead of the 48 they currently work, he could take Jessica back. He reasoned that by reducing the hours of the 5 wait staff employees from 48 to 40 hours per week, an additional 40 hour workweek would be available for a sixth wait staff worker, which would be Jessica. Peter stated that Tony told him that Jessica refused to work 40 hours, but wanted 48 hours per week. Peter did not agree.

Peter stated that he spoke to Tony again, this time telling him that Jessica could return to work. He was told by Tony that she was working at that time and would not return to work. Tony testified, denying that he told Peter that Jessica found another job. Jessica did not return to work.

Peter further stated that he did not discharge Jessica's replacement, as requested by Tony, because he "did not know how to fire" a worker, meaning that he would not feel good about making such a decision. Peter denied discharging Jessica, and denied firing any employees represented by the Union.

Jessica at first denied that the Employer fired her because she was pregnant, but then stated that she believed that she was fired because she filed the Federal lawsuit and because she was pregnant. She filed a Federal lawsuit alleging that she was fired based on sexual preference and gender.

I. The Alleged Interrogation by Respondent's Counsel

Ivan, Rong Chen, and Jessica were asked questions by Respondent's counsel, Benjamin Xue, in July 2010 during depositions in the Federal litigation.

Ivan was asked "are you a member of Chinese Staff and Workers Association. . . . Are you a union member?" He was also asked when he became a union member and the name of the union. He also asked Ivan whether Jessica or any other plaintiffs in the litigation were union members.

Rong Chen was asked whether she was a member of any union, whether Jessica or Zheng Song were union members, and whether she spoke to any "union employees" about the lawsuit, and whether she "attended protests on a weekly basis." She was also asked whether she had any agreements with the Union concerning her work at the Employer relating to the lawsuit.

Jessica was asked when she became a union member, whether she was a union member in September 2009, and whether she is still a member.

Analysis and Conclusions

I. CREDIBILITY

The General Counsel's witnesses testified in a forthright, credible, and consistent manner concerning the significant areas at issue. Thus, Jessica and Ivan both testified in essentially an identical manner that Steven Lam told them that Peter advised that they were union members and should not report to work the following day. They and Rong Chen also testified that Lam told them that unless they lied in court he would not drive them to work thereafter. Lam did not appear at the hearing and thus did not contradict any of this testimony.

Peter's testimony in certain regards is not believable. Jessica's tape recording of her conversations with Peter corroborate

her testimony that she asked for 2 weeks' leave following her miscarriage, while Peter's testimony that she sought a "period of time" is not supported by the recording.

Peter's testimony that he did not understand what he was signing when he executed the recognition agreement and that he does not understand English cannot withstand scrutiny. Thus, he admitted writing notes during this hearing in English yet inexplicably claimed that he did not know what he wrote, and admitted reading the English depositions of his father and Steven Lam. He tended to exaggerate by testifying that he was not allowed to take the recognition agreement to his attorney before he reviewed it but then stated that he did not ask to show it to his attorney and that it was not necessary that his lawyer read it because those at the meeting said the matter could be resolved right there, and by so doing he would not have to pay his attorney to review it.

Further, Peter's insistence that changes were not made in employees' working conditions until August 2009 because the Union would not let him manage his employees or permit him to do so, strains credulity. There was no reason why he could not manage the restaurant and its workers as early as June 10, 2009, when he was given the power of attorney and the authority to act as its owner.

Peter's credibility is harmed by the fact that he claimed that the Union asked him to take the actions now alleged as unlawful, and that the employees agreed with certain changes in their working conditions. Thus, Peter's testimony that he reduced the workers' hours at Tony's request is hard to believe because, contradicting his own testimony, Peter stated that the employees wanted to work longer hours, and in fact he assigned them overtime at their request and the request of the Union even though the Employer's level of business did not warrant overtime work. Further, Peter conceded that Tony wanted Jessica reinstated to her usual 48 hour week. Accordingly, it is unlikely that Tony would have advised him to reduce the employees' hours of work.

In addition, Peter's testimony that the employees readily agreed to his proposal to charge them for the buffet meals they ate is impossible to believe. He claimed that they told him that charging them for meals which were formerly free was "no problem," and that they agreed to any manner in which he wanted to run the restaurant. It is unlikely that they acquiesced to this change. Thus, after the announcement, they began to bring their own food and, having been given free food from the inception of their employment 2 and 3 years before, there is no reason why they would agree to be charged for the food now. This is especially so where the amount charged was not at cost, but at the rate a regular customer would pay. Further, their filing of the lawsuit alleging that the Respondent failed to pay them properly is evidence that they did not acquiesce in they way he operated the restaurant.

The Respondent argues that Jessica's testimony is not credible and cites her testimony regarding the offer to return to work. It contends that Tony told Peter that she did not want reinstatement because she had another job, working for her husband.

Jessica testified here that her husband owned a business called 88 Auto Alarm and Sound. She stated that after her request to return to work at the Respondent, she did not work at her husband's company, although she visited him there and did some cleaning work for which she received no pay. However, in the Federal court deposition she stated that her husband did not own any business, and that she did not know who owned the auto alarm company where he was employed. She further stated that she occasionally visited her husband's shop with her children. While there she occasionally helped clean the windows of customers' cars before they were tinted, and otherwise looked in the shop for work that she could do. She swept and cleaned the area where her children played, went to the bank located near the shop, spoke to customers, and gave business cards to customers asking for them.[14]

Accordingly, although Jessica testified differently in the two forums regarding her husband's ownership of a business, that discrepancy in her testimony does not cause me to find that she is not credible as to the significant matters at issue here. In addition, her testimony that she rode in Lam's car but did not know that the car belonged to Lam does not harm her credibility, even where she acknowledged that Lam told her he owned the car. Lam could have claimed to own the car but may not have actually owned it.

Thus, on the major points concerning areas that concern her, the 1-day suspension, her discharge, the conversations with Lam and Peter, Jessica's testimony was corroborated by other employee witnesses or a tape recording. I accordingly credit Jessica's testimony and the testimony of the other employee witnesses.

I further credit the testimony of Tony where it differs from Peter's. Tony impressed me by testifying in a forthright, direct, believable manner, whereas Peter's testimony was hesitant, contradictory, and generally not believable, particularly as to the circumstances surrounding the execution of the recognition agreement, discussed above.

II. THE RESPONDENT AND ITS SUPERVISORS AND AGENTS

A. The Timeliness of the Amendment of the Complaint

The Respondent objects to the amendments of the complaint, which I granted, amending the name of the Respondent and that Peter and Steven Lam are supervisors and agents of the Respondent.

First the Respondent objects on the ground that the amendments were made after General Counsel rested his case. Second, it objects on the ground that the amendments were untimely since the General Counsel knew of the name of the new

[14] The Respondent submitted, with its posthearing brief, an affidavit of Jessica given in connection with the Federal lawsuit, in support of its position that Jessica's testimony is not credible. The General Counsel opposed its filing. I granted the General Counsel's motion to strike it. I hereby deny the Respondent's request for reconsideration of that ruling. Even if the affidavit is received, I do not find that it detracts from her testimony. The affidavit confirms her testimony that her husband owns and runs a vehicle accessory shop, and when she is at the store she helps but is not paid. Her further statements that when her husband initially opened the business certain documents were filed in her name, and she believes that she has some ownership interest in the business because of their marital status, do not contradict her testimony or affect her credibility in any respect.

entity for 1 year, and he should have alleged that Peter and Lam were supervisors prior to the time of the amendment. Section 102.17 of the Board's Rules and Regulations provides that the administrative law judge may grant an amendment "upon such terms as may be deemed just . . . at the hearing." Thus, since the hearing was open and before me, the amendments were timely made, despite the fact that the General Counsel had rested his case.

The basic requirement for granting an amendment is whether the Respondent had an opportunity to respond to it. Here, the matters concerned with the name of the Respondent and Lam's supervisory status had been the subject of testimony by the Respondent's owner, Peter. Lam, who was employed by the Respondent at the time of the hearing, was given an opportunity to appear at the hearing but declined to do so due to personal matters. It thus appears that the Respondent was given proper notice and the matter had been fully litigated. I accordingly reaffirm my decision to grant the amendments to the complaint.

B. Amendment of the Name of the Respondent

The Respondent objected to the amendment of the complaint, which I granted, to change the name of the Respondent from Century Buffet and Restaurant, Inc., to Century Restaurant and Buffet, Inc., d/b/a Best Century Buffet, Inc., and Century Buffet Grill, LLC.

The Respondent argues that the only entity which recognized the Union is Best Century Buffet, Inc., and that since the General Counsel was aware, since about June 2009, that the complaint had initially named the incorrect party, Century Buffet and Restaurant, Inc., the General Counsel has waived his right to amend the complaint to name additional parties. The Respondent further argues that Best Century Buffet, Inc., owned by Peter's father, stopped doing business in late 2009, and that in about January 2010, Century Buffet Grill, LLC began its operations, and that organization did not recognize any union. The Respondent further notes that each of the entities had different officers and owners.

As set forth above, the original entity was Century Buffet and Restaurant, Inc., owned by the wife of Yen Pang Yeung. Upon her death in 2006, her husband assumed the business, and changed its name to Best Century Buffet, Inc., Steven Lam operated the restaurant. Lam hired and fired employees, decided on the number of staff to be employed, and the number of days they worked, and assigned them work and breaktimes.

On June 10, 2009, Yen Pang Yuen gave his son Peter the power of attorney, authorizing him to act in his place to manage, operate, and conduct all transactions relating to the business, and on January 1, 2010, Peter became the sole owner of the business and renamed it Century Buffet Grill, LLC.

Based on the above, a finding is warranted that the correct name of the Respondent is as amended at the hearing, Century Restaurant and Buffet, Inc., d/b/a Best Century Buffet, Inc., and Century Buffet Grill, LLC. Thus, the business continued in unchanged form at the same location with the same furniture and equipment from at least the time that it was operated by Peter's mother as Century Buffet and Restaurant, Inc. It has been at all times owned by immediate members of the same family.

Importantly, a majority of the admitted appropriate bargaining unit, the wait staff, comprised of Rong Chen, Ivan, and Jessica, was employed during the period of time that the Employer was known as Best Century Buffet, Inc., and were retained by Century Buffet Grill, LLC.

C. Supervisory Status of Peter and Steven Lam

I also find that as Peter is the admitted sole owner of the Respondent he is, by virtue of that fact, its supervisor and agent. The power of attorney gave him the authority to operate the Employer as of June 10, 2009, and he has acted as its owner since then, changing the working conditions of the employees, discharging Jessica, and negotiating with the Union.

I also find that Steven Lam is a supervisor and agent of the Respondent. Lam was in complete control of the Respondent's operations from Mrs. Yeung's death and during her husband's ownership of the restaurant, from 2006 until at least August 2009, hiring and firing workers and making assignments to the employees. Accordingly, Lam acted as a supervisor during that period of time.

I credit the mutually corroborative testimony of Ivan and Jessica that Lam called them in July 2009 and told them that Peter advised that they were union members and that they should not appear at work the following day. I further credit the identical testimony of Ivan, Jessica, and Rong Chen that when they told Peter on August 8, 2009, that Lam told them to lie in federal court by testifying that they paid the $5 transportation fee voluntarily, Peter told them that since they were suing him they would speak in court.

Both sets of conversations took place during the period of time that the Respondent admits that Lam acted as the operator of the restaurant from 2006 until August 2009. Peter claimed that on August 2, 2009, the Union gave him the authority to manage the restaurant, but I cannot credit that testimony. The Union clearly had no basis to give him such authority. Moreover, 2 months earlier, on June 10, Peter had a power of attorney giving him the authority to operate the restaurant.

Even if Peter was in fact the owner of record of the Employer as of June 10, 2009, it is clear that Lam possessed apparent authority to act in the Employer's behalf.

Thus, the evidence is clear that from 2006 to at least August 2, 2009, Lam had actual authority to advise Ivan and Jessica that because they were union members they should not appear for work. If he did not have the actual authority to do so, he was acting as an agent of Peter in relaying Peter's instructions that they be suspended for 1 day due to their union membership.

In addition, in advising Ivan, Jessica, and Rong Chen on August 7, 2009, that they should lie in court, Lam was acting with at least apparent authority in giving that advice. His conduct was ratified by Peter's advice to the three workers the next day that since they were suing him they would speak in court. Thus, Peter did not disavow Lam's advice that they commit perjury.

Even assuming that Lam was not a supervisor of the Respondent during the material times at issue, it is clear that he was its agent. Section 2(13) of the Act provides that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts,

the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

In *Zimmerman Plumbing Co.*, 325 NLRB 106, 106 (1997), the Board stated that "it is well established that apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question." See generally *Dentech Corp.*, 294 NLRB 924 (1989). Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426–427 (1987).

Lam was the sole operator of the restaurant from 2006 until at least August 2009, admittedly hiring and firing employees, making assignments of days and hours of work, deciding the number of staff to be employed, the number of days they worked, and assigning them work and break times. As such, the employees could reasonably believe that he was the person in charge. The statements he made to the workers in July and August 2009 would be clearly viewed by them as coming from someone who was speaking and acting for management and whose comments reflected company policy. It is significant that when Ivan and Jessica were told by Lam in July that they should not report to work the following day, they did not come to work. This shows that the employees believed that Lam had the power to suspend them and they followed his order.

I accordingly find and conclude that Lam was a supervisor and agent at all times relevant hereto, and that the Respondent is responsible for his statements and actions.

III. THE ALLEGED VIOLATIONS OF SECTION 8(A)(1) AND (3) OF THE ACT

A. Legal Principles

The question of whether the Respondent unlawfully (a) implemented a new policy requiring unit employees to pay for their meals, (b) eliminated the employee transportation benefit for unit employees, (c) reduced the work hours of unit employees, and (d) implemented a new procedure requiring unit employees to sign in and sign out for work each day, because its employees joined and assisted the Union and engaged in concerted activities is governed by *Wright Line*, 251 NLRB 1083 (1980). Under that test, the General Counsel must prove by a preponderance of the evidence that employees' protected conduct was a motivating factor in the adverse employment action. This burden is met by showing (a) that the employees were engaged in protected activity, (b) that the employer had knowledge of that activity, and (c) that the employer had animus toward such activity.

Once the General Counsel has made the requisite showing, the burden then shifts to the Respondent to prove, as an affirmative defense, that it would have taken these actions even in the absence of the employees' union and concerted activities.

To establish this affirmative defense "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activity." *L.B. & B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' taken these actions, but whether it 'would have' done so, regardless of their union activities" or concerted activities. *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006). Accordingly, the Respondent may present a good reason for its actions, but unless it can prove that it would have taken such actions absent the employees' union and concerted activities, the Respondent has not established its defense. "The policy and protection provided by the Act does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the [employment actions] is to retaliate for an employee's concerted activities. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for taking the action in question; rather it 'must show by a preponderance of the evidence that the action would have taken place even without the protected conduct.'" *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469 fn. 17 (2007).

B. The General Counsel's Prima Facie Case

The evidence supports a finding that Rong Chen, Ivan, and Jessica engaged in activities in support of the Union by joining it and attending union meetings. Rong Chen and Ivan also attended two sessions with Union Agent Tony at which they spoke about their working conditions and Peter signed the recognition agreement. Peter testified that he knew that Jessica was a member of the Union.

The three workers also engaged in protected concerted activities by filing a lawsuit pursuant to the Fair Labor Standards Act and the New Jersey Wage and Hour Law, alleging that the Respondent failed to pay them minimum wages, overtime, and the proper tips. *U Ocean Palace Pavilion, Inc.*, 345 NLRB 11762, 1170 (2005). They served a copy of their complaint on Peter personally.

The above establishes that the employees engaged in union and protected concerted activities, and that the Respondent knew that they had engaged in such activities.

C. The Changes in Working Conditions

There is no dispute that in August 2009 the Respondent changed its employees' working conditions by requiring that they pay for the meals they ate at its buffet, eliminating their transportation to and from work that it had previously provided, reducing their hours of work, and requiring them to sign in and out of work.

Thus, I have found above that employees Rong Chen, Ivan, and Jessica engaged in concerted and union activities and that Respondent had knowledge of those activities. The remaining question is whether the Respondent, in making those changes, was motivated by those activities.

1. The requirement that employees pay for meals

Prior to the employees' filing of the Federal lawsuit in April 2009, the Employer provided three free meals per day from the buffet for its wait staff. In August 2009, however, they were

advised by Peter that they had to pay for those meals, and the amounts of the meals were deducted from their base pay.

Peter stated that he changed the free meal policy in August because, at that time, the Union "permitted" him to manage the wait staff, and he decided to charge the workers for their meals and he continued to charge them until January 2010. He also stated that the employees agreed to be charged for their meals, a claim the workers denied. In fact, they testified that, rather than be charged the amount the customer is charged for the meal, they stopped eating the buffet meals and instead brought food from home, but nevertheless they continued to be charged until January 2010.

I find that in requiring its employees to pay for meals the Respondent was motivated by their union and concerted activities. Thus, during the 2- to 3-year course of their employment, the employees were provided with free buffet meals. However, this policy was abruptly changed in August only after the employees' interest and involvement with the Union became known, and after the Federal lawsuit was filed. By requiring them to pay for their meals, the Respondent engaged in retaliation toward them because of those activities. This is especially so since the employees were charged at the regular customer rate for the meals. Further, the Respondent sought to punish the workers by continuing to charge them for meals even though they no longer ate the Employer's buffet meals, but rather brought their own food to eat. I accordingly find that the General Counsel has proven that the change in the meal policy was motivated by their union and concerted activities. *Wright Line*, above. See *Catalyst*, 230 NLRB 355, 357 (1977), where a threat to eliminate free food previously provided to the employees was found violative of the Act.

Additional evidence of animus is seen in the fact that the kitchen workers, cashier, a part-time waiter, and the hosts were not charged for their meals according to Ivan's testimony, which I credit. These employees were not part of the unit seeking union recognition, and were not plaintiffs in the Federal litigation. I reject Peter's testimony that all wait staff were charged for meals, including Steven Lam, with no distinction being made between members of the Union and those who were not members. However, no credible documentary evidence was produced to support that claim.

The Respondent's defense that Peter made the changes because it was only in August that Peter was permitted by the Union to manage the employees is no defense at all. Thus, no valid explanation was given as to why the employees began to be charged for meals in August. Even assuming that Peter was given the authority to manage the employees in August and that accounted for the change, still the change was discriminatory. I accordingly find and conclude that the Respondent has not proven that it would have required employees to pay for their meals even in the absence of their union and concerted activities.

2. The elimination of the employee transportation benefit

Employees were charged and they paid $5 for daily round-trip transportation from Manhattan to the Respondent's place of business. That service was provided by Steven Lam who I have found to be a supervisor and agent of the Respondent. In early August 2009, after the Federal lawsuit was filed which alleged that the Respondent and Lam agreed to provide free transportation but failed to continue to provide that service, Lam told the workers that they should testify in Federal court that they paid him the fee voluntarily. Thus, he was asking them to contradict the lawsuit's allegation that they were promised free transportation. They refused to do so and Lam stopped driving them to and from work. When they appealed to Peter, for help he told them that they sued him and they could talk in court.

There was also testimony that Lilly, a member of the wait staff, continued to be driven to work by Lam. Lilly has not been identified as someone who was a member of the Union or involved in any concerted activities, and she is not a plaintiff in the Federal court case. This establishes that the Respondent discriminated against only those who engaged in union and concerted activities.

I find, based on the above, that the employees' involvement in union and concerted activities was well known to the Respondent. The transportation benefit which consisted of driving the wait staff to and from work was eliminated only after the Federal lawsuit was instituted and after they joined the Union and became active in its behalf. Their daily rides were stopped only because Lam asked them to testify that they agreed to pay him voluntarily. I accordingly find and conclude that the General Counsel has proven that the elimination of this benefit was motivated by the employees' union and concerted activities. *Wright Line*, above.

The Respondent first argues, and I agree, that the workers were charged and paid for their transportation years before the Union began organizing them. However, the violation is that that benefit was eliminated after their union and concerted activities began, and it is the elimination of their transportation in retaliation for those activities that is alleged as an unfair labor practice.

The Respondent argues that Lam acted on his own in driving the workers in his personal vehicle, that he stopped driving them for some unknown reason, and that the Respondent was not involved in that service and did not pay Lam's vehicle expenses. I have already found that Lam is an agent and supervisor of the Employer. As such, his actions are attributable to the Respondent. In addition, the fact that Lam drove the workers was known by Peter who must have approved of Lam's transportation of the workers so that they may arrive at work on time. Thus, it cannot be said that Lam was acting on his own in providing transportation to the workers. Further, Peter acquiesced in Lam's refusing to continue to provide transportation by telling the workers when they complained that Lam asked them to lie in court, that they were suing Peter and that any further conversation about the matter would be in court.

I accordingly find and conclude that the Respondent has not proven that it would have eliminated the transportation benefit for its employees even in the absence of their union and concerted activities.

3. The reduction in employees' work hours

There is no dispute that the wait staff hours of work were reduced in August 2009. Prior to filing the Federal lawsuit, the wait staff worked 5 to 6 days per week, from 12 to 13 hours per

day, but in August 2009, they worked only 5 days per week, for about 9-1/2 hours per day.

As set forth above, the employees' union and concerted activities, which were known to the Respondent, coupled with the animus toward those activities compel a finding that the change in their work schedule was motivated by their protected activities.

The Respondent argues that Peter reduced the work hours of the wait staff because business was poor, and because Union Agent Tony requested him to do so because the employees wanted to work fewer hours. First, it is very doubtful that Tony would ask that the employees work fewer hours, thereby making less money. Second, Peter testified that he assigned them 8 hours overtime at their request. There was no credible evidence that business declined during that period of time. Peter's assignment of overtime to the employees is evidence that work continued to be available and that the restaurant's business had not declined. Further, the Respondent's claim that the Union permitted Peter to manage the workers' time in August and allowed the change in hours cannot be credited.

In addition, employees testified that the work hours and days of work of wait staff employee Lilly, who was not a union member, and part-time worker David who is Peter's cousin, and the kitchen staff, were not reduced. No credible evidence was adduced to refute this testimony. In addition, after Jessica was discharged in September, two replacements, Amy, and then Nicole, were hired. This evidence demonstrates that the Respondent discriminated against the three workers who were identified with the Union and with the lawsuit by reducing their work hours.

I accordingly find and conclude that the Respondent unlawfully reduced the work hours of Rong Chen, Ivan, and Jessica. I accordingly find and conclude that the Respondent has not proven that it would have reduced the work hours of the three employees even in the absence of their union and concerted activities. *Alterman Transport Lines*, 341 NLRB 1282, 1292–1294 (1992).

4. The requirement that employees sign in and out of work

There is no dispute that prior to August 2009, the wait staff was not required to sign in and out of work, but after that time such a requirement was imposed.

Peter testified that as a result of the Federal lawsuit which alleged violations of the minimum wage and overtime laws, he was required to maintain precise records of employees' worktime in order to calculate what wages were owed. As a result of that requirement he instituted a policy of having the wait staff sign in and out of work. He also claimed that Union Agent Tony asked him to keep these records.

It is not disputed that Federal and New Jersey laws require that the Respondent maintain and keep records of its employees' hours of work. However, the question is the Respondent's practice prior to the change, the new requirement, the timing of the change and the reason for the change. Here, no time records whatsoever were required to be kept by employees prior to August 2009. Beginning in that month, a number of changes were made in employees' working conditions, including that they sign in and out of work. It is clear, based on the changes made, set forth above, in the requirement that the workers pay for their meals, the elimination of the transportation benefit and the reduction in their hours, that these changes were made at the same time for the same reason—retaliation for their engaging in union and concerted activities.

Peter's testimony in this regard is not credible. First, he denied asking only the wait staff to record their hours, stating that he asked every employee to sign in and out, but then testified that from August 2009 to December 31, 2009, the kitchen workers were not required to sign in and out of work because they had a regular schedule. If that is the case, why were they asked to sign in and out beginning January 1, 2010?

The Respondent contends that it required the wait staff to sign in and out in order to comply with those laws requiring it to maintain records of employees' worktime. However, those laws require that the Employer maintain records of all of its employees' work hours. Accordingly, by not requiring the kitchen staff to sign in and out of work, the Respondent was clearly making a distinction between them and the wait staff. In this regard, a finding may be made, which I do make, that inasmuch as the kitchen workers were not identified as a group that became involved in union and concerted activities, they were not asked to sign in and out.

Accordingly, I find and conclude that the imposition of the requirement that the wait staff begin signing in and out of work was in retaliation for their union and concerted activities and violated Section 8(a)(3) and (1) of the Act. *United Refining Co*., 327 NLRB 795, 796, 798 (1999).

D. The Discharge of Jessica

As set forth above, Jessica prominently engaged in union and concerted activities, by being a plaintiff in the Federal court litigation and presenting the Federal complaint to Peter. Peter testified that he knew that Jessica was a union member. She was the subject of an unlawful 1-day suspension when she was told by Lam that Peter identified her as being a union member and ordered Lam to tell her to take the next day off. When she sought help from Peter as to Lam's direction that she lie in court regarding the transportation arrangements, Peter told her that she was suing him and that she should speak in court.

The above establish that Jessica engaged in union and concerted activities, those activities were known to the Respondent which bore animus against the Union, and that her discharge was motivated by such animus.

It is clear that Jessica requested only a 2-week leave of absence. When she called Peter and asked to return to work at the end of the 2-week period, Peter refused, stating that he had hired another worker, Nicole. Although he told her that she would be the first rehired, he nevertheless hired another worker, Amy. Peter hired the two replacements in September despite his protestations that business was poor and that he did not need her services, and that he reduced the hours of his employees because of poor business.

Jessica testified that following her discharge she filed a federal discrimination lawsuit against the Employer based on sexual preference and gender, and testified that she believed that she was discharged because of her participation in the federal wage and hour lawsuit and because she was pregnant. The Re-

spondent relies on these facts to argue that Jessica was not discharged for her union or concerted activities. The Board has held that the filing of an EEOC charge is not inconsistent with a claim of discriminatory discharge under the National Labor Relations Act that she was fired only for her union and concerted activities. "Because there can be multiple reasons for a discharge, and because one or more reasons may be covered by different statutes, as here, multiple charges covering those suspected reasons are not inconsistent. In any event, the theory of the case comes from the General Counsel, not from the alleged discriminatee." *Gallup, Inc.*, 349 NLRB 1213, 1249 (2007).

The Respondent argues that it offered Jessica reinstatement to a job at 40 hours per week and she refused that offer. First, there is no evidence that she was offered such a position. In his conversation with Jessica on September 17, set forth above, Peter told her that he had no job for her and that she should find another job, and that sometime in the future, when work was available, he would contact her. Clearly, therefore, on September 17 when she told Peter that she was ready to return to work, the Respondent did not offer her a job. Rather, he informed her that she was no longer employed with the Employer.

Second, Jessica credibly denied being offered reinstatement at 40 hours per week, and Peter did not testify that he directly offered her such a position. Instead, the Respondent apparently refers to the discussion between Peter and Tony, following Jessica's discharge, during which Peter told Tony that a 40 hour per week job was available but only if all the wait staffs' hours were reduced by 8 hours per week. Jessica reasonably refused to return to work for 40 hours because she had previously worked 48 hours per week. Thus, although this is technically a matter for a compliance proceeding, even if this offer of reinstatement was made, it was not an unconditional offer because it was (a) conditioned on the other wait staffs' hours being reduced, an event which had not yet occurred and (b) it was an offer to return at a reduced workweek. The Respondent's reliance on the doctrine of constructive discharge is misplaced since Jessica was fired upon her request to return to work following a permitted leave of absence. This was not a situation where she was forced to leave because of intolerable working conditions.

I accordingly find that the Respondent has not proven that it would have discharged Jessica even in the absence of her union and concerted activities, and I conclude that the Respondent discharged Jessica in violation of Section 8(a)(3) and (1) of the Act.

E. The Alleged Interrogation by Respondent's Counsel

The complaint alleges that Respondent's attorney Benjamin Xue interrogated employees about their union activities and the union activities of other employees. The alleged interrogation took place during his questioning of employees while taking their depositions for the federal court litigation.

As set forth above, the workers were asked whether they were union members, when they became union members, whether they continued to be union members, whether named employees were union members, whether they spoke to any union members about the lawsuit, whether they had any agreements with the Union concerning their work at the Employer relating to the lawsuit, and whether they attended protests on a weekly basis.

At this hearing, Respondent's attorney Xue stated that he asked those questions which he believed were relevant to the wage and hour litigation, to determine the employees' "knowledge of the overtime minimum wage requirement. The law required it. You had to file an action within two years or three years. It depends on when did you obtain the knowledge." Xue further stated that the employees he questioned were represented by counsel at the deposition who did not objet to the questions.

On brief, Xue states that the questions he posed were relevant to the question of "how the plaintiffs brought this action against the Employer. Century Buffet sought information regarding whether the plaintiffs may have entered into any illegal financial agreements with any entities, including unions, in bringing their wage and hour case. Obviously, the timing of when [the employees] became union members would dictate whether such an arrangement was possible."

In *Guess?, Inc.*, 339 NLRB 432, 434 (2003), the Board established a three-part test to determine whether a respondent's deposition questions are lawful. "First, the questioning must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this information must outweigh the employees' confidentiality interests under Section 7 of the Act."

Under the first part of the test, Xue argues that the questions were relevant because they were intended to disclose the employees' knowledge that they had to be paid the proper wages, and the date they obtained that information as it relates to the timeliness of the lawsuit. Xue further contends that he asked when they became union members in order to determine if the employees entered into any illegal financial agreements with the Union in bringing their case.

The only questions claimed to be illegal are those which asked about the employees' union activities and the union activities of other workers.

The Federal Rules of Civil Procedure provides broadly that "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense…. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1).

Accordingly, the Federal Rule permits broad questioning in relevant areas. However, I simply cannot find that the questions asked are relevant to the areas of inquiry deemed to be important to the Respondent. The statute of limitations requires the plaintiff to bring the action within a certain period of time, apparently based upon when the employees became aware that they were being paid incorrectly. I cannot see the relevance in asking the employees if they were union members, whether they remain union members, whether other employees were union members, or whether they attend protests on a weekly basis, in order to ascertain this information.

I accordingly find that the questioning was not relevant. Turning to the second part of the *Guess?* test, the General Counsel, on brief, states that he "makes no claim that Respond-

ent had an illegal objective in asking its questions." Accordingly, assuming that the questioning was relevant, and there was no illegal objective in asking the questions, the third part of the test is whether the employer's interest in obtaining the information outweighs the employees' confidentiality interest under Section 7 of the Act.

Section 7 of the Act gives employees the right to keep confidential their union activities. *Guess?*, above; *National Telephone Directory Corp.*, 319 NLRB 420 (1995). The interrogation is unlawful where the respondent has not "demonstrated that its need for this information justifies compromising its employees' Section 7 right to confidentiality." *Guess?*, above, at 435. Here, Xue's questions were extremely broad. Other factors weigh in favor of employee confidentiality including that this case began as a union organizing campaign; a complaint had issued against the Respondent only 1-1/2 months before the questioning took place; this case contains a record of the Respondent's hostility against union organizing; and the questioning was conducted by the Respondent's labor counsel who represented it at the instant hearing. *Allied Mechanical*, 349 NLRB 1077, 1083 (2007). Moreover, the fact that employees being questioned were open and active union supporters does not minimize the effect of the interrogation. *Chinese Daily News*, 353 NLRB 613, 613 (2008).

The Respondent's argument that the employees' attorney was present and did not object to the questioning does not make the questions less coercive. *Guess?*, above at fn. 11, where the Board rejected the identical argument by the respondent in that case.

I accordingly find and conclude that the Respondent has not proven that its interest in obtaining the information concerning the employees' union membership and the union membership of other employees outweighs the employees' confidentiality interest under Section 7 of the Act. I therefore find that Xue's questioning of the employees constituted unlawful interrogation.

IV. THE VIOLATIONS OF SECTION 8(A)(5) OF THE ACT

A. The Appropriate Bargaining Unit and the Union's Majority Status

As set forth above, on June 10, 2009, Peter, the owner of the Respondent, signed a recognition agreement in which he recognized the Union as the exclusive representative of a majority of the full-time and regular part-time wait staff employed by the Respondent. The agreement stated that the Respondent agrees that the unit contains five wait staff employees, and that the Respondent "checked the union authorization cards which showed that the Union has three out of five wait staff" employees who currently work at the restaurant.

The admitted appropriate collective-bargaining unit is as follows:

> All full-time and regular part-time wait staff employed by the Respondent at its Clifton, NJ restaurant, excluding professionals, and guards and supervisors as defined in the Act.

I reject the Respondent's arguments that it did not recognize the Union, contending that Peter did not know what he was signing, does not read English, that he signed under false pretenses because he believed that the Union would withdraw its federal litigation, that he signed under duress because the Union threatened that it would demonstrate in front of his restaurant, and that he was prevented from asking his attorney for advice as to whether he should sign it. Thus, I credit the evidence from the General Counsel's witnesses, set forth above, that (a) the agreement was explained to Peter in detail, (b) Peter reads and understands English, (c) he was promised only that the Union would withdraw its election case at the Board upon his execution of the document, which it did immediately, and (d) Peter did not ask to show the document to his attorney.

As the Respondent's owner and president with the power of attorney to conduct all transactions for the Employer, Peter had actual authority to execute the Recognition Agreement. In fact, he obtained the power of attorney on the very day of the first meeting with the Union "in order to talk to the Union not to sue us." The Union's willingness to withdraw the election petition in exchange for the agreement clearly indicates that the Union believed the recognition agreement was valid. Moreover, Peter was aware that the Union was alleging the existence of a voluntary recognition agreement as of June 10, 2009, but the Respondent did not disavow or repudiate the agreement until it filed its answer in this proceeding. It also undertook to engage in further bargaining with the Union at the July 22 meeting, and later negotiated regarding providing employees with a transportation reimbursement, eliminating side work, and Lam's taking a share of the wait staff's tips. Further, Peter thereafter spoke to Tony regarding Jessica because he believed that Tony "represented" Jessica. Peter would not have done any of these things unless he believed that he had validly recognized, and was legally obligated to bargain with, the Union. *One Stop Kosher Supermarket, Inc.*, 355 NLRB 1237, 1240–1242 (2010).

Accordingly, even assuming arguendo, that parol evidence is admissible to prove that an otherwise unambiguous recognition agreement was fraudulently obtained or obtained by duress, I find that the Respondent has failed to prove that defense. See *Sheehy Enterprizses, Inc.*, 353 NLRB 803, 804 (2009), enfd. 602 F.3d 839 (7th Cir. 2010); *Horizon Group of New England*, 347 NLRB 795, 797 (2006), where it was held that in order to establish a "fraud in the execution" defense, the employer must show that it relied on misrepresentations by the union; that it did not know the character or essential terms of the agreement; and that it did not have a reasonable opportunity to obtain such knowledge. The Respondent has not proven such a defense. As set forth above, I cannot find that the Union misrepresented that it would withdraw its Federal court action if the recognition agreement was signed. Rather, the Union promised to, and immediately did withdraw only the election petition because the recognition agreement obviated the need for an election. In addition, I find that Peter was well aware of the character and essential terms of the agreement. The agreement expressly stated that the Respondent recognized the Union as the employees' representative. Furthermore, "fraud in the execution" is not established where the employer had a reasonable opportunity to read the agreement. *Horizon Group*, above; *Positive Electrical Enterprises*, 345 NLRB 915, 922 (2005).

The recognition agreement stated on its face that the Respondent checked the union authorization cards which showed

that three out of five wait staff then employed by the Respondent signed cards for the Union. I, accordingly, find that the Respondent has voluntarily recognized the Union. "Once certified by the Board or voluntarily recognized by an employer as the majority representative of a unit of employees, a union enjoys a presumption of continuing majority support and the employer has a corresponding obligation to recognize and bargain with the union." *Minn-Dak Farmers Cooperative,* 311 NLRB 942, 944 (1993).

B. The Unilateral Changes in Employees' Working Conditions

As set forth above, I have found that the Respondent made changes to the employees' working conditions, specifically the (a) requirement that employees pay for meals, (b) elimination of the transportation benefit, (c) reduction in employees' work hours, and (d) the requirement that employees sign in and out of work. I have found, above, that those changes were made in order to retaliate against employees in violation of their rights under Section 8(a)(3) of the Act.

It is well established that where a union represents the employer's workers, the employer must give notice to the union or an opportunity to bargain with it concerning such changes prior to their implementation. *Tri-Tech Services*, 340 NLRB 894, 895 (2003). Here, the Respondent gave no notice to or opportunity to bargain with the Union concerning such changes. All the changes involved herein were changes in employees' terms and conditions of employment which constituted mandatory subjects of bargaining.

I credit Union Agent Tony's testimony that the Respondent never advised the Union in advance that it would begin charging the employees for their meals, or that it was reducing the employees' hours of work, or that it was eliminating the transportation benefit, or that it would require that the wait staff sign in and out of work. Further, Tony stated that the Union never agreed that such actions should be taken.

The Union did not receive timely notice of any of the above changes and thus had no opportunity to meet and bargain with the Respondent concerning such changes. Accordingly, the unilateral changes set forth above violated the Respondent's obligation to meet and bargain with the Union pursuant to Section 8(a)(5) and (1) of the Act. See *Nathan Littauer Hospital Assn.*, 229 NLRB 1121, 1124–1125 (1977), where the employer required employees to punch a timeclock whereas prior thereto there was no requirement that they record their time; *San Juan Teachers Assn.*, 355 NLRB 172, 174 (2010), where the employer reduced its employees' work hours; *Beverly Enterprises*, 310 NLRB 222, 239 (1993), where the employer eliminated free food provided to its employees, even where the food consisted of coffee; *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232, 248 (2008), where the employer, as here, ceased providing transportation to and from work for its employees.

The Respondent argues that the Union was generally aware of the changes it made in its employees' working conditions and contends, therefore, that the Union had actual notice of such changes, but failed to request bargaining as to these issues and therefore waived its right to bargain about those matters. It contends that the Union received notice of the Respondent's intention to reduce its employees' working hours at the two meetings that were held in June and July. As set forth above, I cannot credit Peter's testimony that at the June 10 meeting, Tony requested that the employees' work hours be reduced.

The Respondent also argues that it met its obligation to bargain about the transportation benefit by speaking to the Union at both meetings concerning how much money should be paid to the workers to reimburse them for their transportation costs. However, the violation is that the Respondent changed the employees' working conditions by ceasing to transport them to and from work. There was no bargaining concerning the Respondent's decision to stop providing such transportation. Rather, Lam abruptly refused to drive the employees to work, and the Respondent did not provide notice to the Union or an opportunity to bargain with it concerning that change. The Respondent's belated bargaining concerning how much the employees should be paid in reimbursement as a result of the unilateral change does not excuse the fact that the change itself was made without notice to the Union.

The Respondent contends that the Union should have been aware that the Employer would request employees to sign in and out of work because the workers brought the federal lawsuit alleging violations of minimum wage and overtime laws. The Employer reasons, therefore, that the Union must have known that the Respondent would require them to keep such time records. However, it has not been shown that the Union was given any notice that the Employer would require the workers to sign in and out of work. Even if the employees were given advance notice, a fact which has not been proven, such notice to employees does not excuse the Respondent from its obligation to advise the Union of the change and give it an opportunity to bargain with it about the proposed change.

Similarly, the Respondent argues that it informed its employees that if they continued to eat their meals from the Employer's buffet they would be charged for such meals. The Respondent does not claim that it notified the Union of this change but contends that notice to the employees was sufficient to satisfy its obligation to advise the Union of this change. First, it is not clear that the employees received notice of the change prior to its implementation. However, even if the workers were told in advance, the Union was not notified of the change and given an opportunity to bargain with the Respondent concerning the new policy of charging employees for meals they ate at the buffet.

The Board has found that notice to employees of a change in working conditions does not constitute notice to the union. "One of the purposes of initial notice to a bargaining representative of a proposed change in terms and conditions of employment is to allow the representative to consult with unit employees to decide whether to acquiesce in the change, oppose it, or propose modifications. A union's role in that process is totally undermined when it learns of the change incidentally upon notification to all employees." *Roll and Hold Warehouse and Distribution Corp.*, 325 NLRB 41, 41–42 (1997).

Further, the Respondent argues that the Union failed to request bargaining over the changes that it made, thereby waiving its right to bargain about the changes. I do not agree. The Re-

spondent's implementation of the changes was presented to the Union as a fait accompli, making any demand for bargaining futile. See, e.g., *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023–1024 (2001), where the union's failure to request bargaining over changes to employee benefits did not constitute a waiver where the union did not receive notice of the changes until after they were implemented.

I accordingly find and conclude that the Respondent had an obligation to give timely notice of these changes in working conditions to the Union before it made a general announcement to the employees. By failing to do so, the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Li Xian Jiang (Jessica), Respondent violated Section 8(a)(3) and (1) of the Act.

2. The following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time wait staff employed by the Respondent at its Clifton, NJ restaurant, excluding professionals, and guards and supervisors as defined in the Act.

3. The Respondent voluntarily recognized the Union in the above appropriate collective-bargaining unit on June 10, 2009, and thereupon assumed an obligation to bargain with the Union concerning changes in terms and conditions of employment before implementing such changes.

4. At all times material herein the Union has been the exclusive collective-bargaining representative of the employees in the above unit.

5. By implementing a new policy requiring bargaining unit employees to pay for their meals, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

6. By eliminating its employee transportation benefit for bargaining unit employees, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

7. By reducing the work hours of employees in the bargaining unit, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

8. By implementing a new procedure of requiring bargaining unit employees to sign in and sign out for work each day, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Li Xian Jiang (Jessica), it must offer her reinstatement and shall make her whole for any loss of earnings and other benefits suffered as a result of the unlawful action against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge, and to notify her in writing that this has been done and that the warning and discharge will not be used against her in any way.

I shall order that the Respondent be ordered to rescind the unilateral changes it made on or after June 10, 2009, but nothing in the Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the employees.

I shall also order that, at the Union's request, the Respondent be ordered to restore to unit employees the terms and conditions of employment that were applicable prior to June 10, 2009, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining.

Inasmuch as many of the Respondent's employees are Chinese speaking, I shall order that the notice be posted in Chinese and English.

[Recommended Order omitted from publication.]